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A National Communications Policy

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The 1992 Cable Act required cable operators to carry the programming of over-the-air broadcasters. Congress created this "must-carry" requirement because it feared that, absent such regulation, cable systems would drop over-the-air broadcasts entirely. This could weaken the broadcast industry to the point that homes not presently served by cable might be left without any television at all.

Like the television duopoly rule and the radio-television cross-ownership rule, the must-carry regulations imposed burdens on certain members of the television industry. The duopoly and cross-ownership rules place limits on the speech interests of broadcasting companies, insofar as they deny the opportunity to acquire more soapboxes; these rules may also prevent broadcasters from realizing certain economic benefits that would come from owning more outlets. Similarly, the must-carry provisions interfered with cable operators' freedom to decide what programs to carry, and they also constrained the interests of excluded

cable programmers and their potential viewers. These interests had a speech component as well as the obvious economic one. Nonetheless, the Supreme Court upheld the must-carry provisions in its 1997 Turner Broadcasting decision. As the Court saw it, the issue was not simply whether the regulations created burdens, or even whether they burdened speech interests, all regulations of mass media have this effect, but whether these burdens were justified in light of the overriding purpose they served.

The Supreme Court held that the purpose of the must-carry requirement--to ensure that the 40% of American homes without cable had access to television--was indeed sufficient to justify the restraints these regulations imposed. The majority, however, divided over the proper methodology for arriving at this conclusion. Justice Kennedy wrote one of the opinions and relied primarily upon an antitrust rationale for the must-carry regulations. Noting the substantial vertical integration of the cable industry, he argued that the regulations were proper as a means of preventing cable operators from using predatory practices to drive over-the-air broadcasters out of business.

Justice Breyer, also part of the majority, disavowed any reliance on antitrust. He analyzed the case purely in First Amendment terms. His fear was that the cable operators would drop over-the-air broadcasters, not for predatory purposes, but for well-founded economic reasons -- alternative programming would be more profitable. In that instance, the must-carry regulation

could not be justified in economic terms, yet, Breyer argued, a satisfactory rationale could be found in the "the national communications policy" he saw rooted in the First Amendment. Specifically, he upheld the must-carry provisions because they ensured that all citizens had access to television and could therefore obtain the variety of views essential to a proper discharge of their democratic responsibilities. While the Justice recognized the burdens these regulations created, and that these burdens had a speech component, he insisted that there were "important First Amendment interests on both sides of the equation."

Of course, there are important differences between the regulations the Supreme Court addressed in Turner Broadcasting and those now before the Commission. Yet I draw from that case -- the latest and most authoritative statement of the law covering television -- two general principles that are highly relevant to the present debate and that should, in my opinion, guide the Commission.

The first concerns the values that the Commission should consider in making its decision. Those who oppose the duopoly and cross-ownership rules argue that these rules restrain competition and that repealing them would increase the efficiency of the broadcast industry. This may be so, but in the context of our national communications policy, furthering economic efficiency is not an end in itself but only an instrument for

promoting "the widest possible dissemination of information from diverse and antagonistic sources." Economic efficiency may further this policy, but it does not always, and when the two are in conflict priority must be given to the maintenance of diversity because it is rooted in the Constitution and the needs of democratic citizenship.

Justice Kennedy did not explicitly address the question of priority because he found the preservation of competition sufficient to justify the must-carry regulations; yet because I find his economic analysis to be such a stretch, I wonder whether he might be implicitly endorsing this understanding as to the priority of diversity. Justice Breyer's priorities are easier to discern. He does not dispute or contradict the economic analysis, but avoids any reliance upon it whatsoever. In his mind, diversity is wholly sufficient. For this to be so, however, he must be saying that even if some anticompetitive effect can be shown -- as the cable operators maintained and indeed seems likely -- the must-carry regulations can be sustained on First Amendment grounds.

The second principle affirmed by Turner concerns the continuing importance of broadcast television in contemporary society. Some have argued that the Commission's ownership restrictions no longer serve any useful purpose due to technological advances in the media industry--increasingly, Americans are obtaining information from sources such as cable

programming, the Internet, and satellite transmission, so maintaining information diversity within the broadcast spectrum itself might seem unimportant. However, the Turner decision recognized that broadcast television continues to play an important independent role in our political life, largely because a substantial percentage of Americans lack access to the more advanced communication technologies. As long as a significant percentage of Americans remain dependent on broadcast television for their public information, it will be important to protect programming diversity in the broadcast spectrum. The new media sources compete with broadcast networks, but they have not replaced them.

Both of these principles stem from a single, fundamental insight that underlies Turner Broadcasting: There is a difference between First Amendment values and economic values -- freedom and efficiency are not the same. Freedom is the end, efficiency the means, and the means should never govern the end.